

The Nooksack Rule

State Supreme Court will review Whatcom County water policy

By Tim Johnson
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Has Whatcom County planned development where there is adequate supply of water? Has the county adequately protected its water resources? The Washington State Supreme Court may decide.

Their decision, based on arguments to be delivered Oct. 20, could yield clarity and consistency to water resource planning and policy.

“This issue came up because of the simple, undisputed fact that there is not enough water to go around in the county’s rural areas,” attorney Jean Melious explained. A land-use and environmental law associate with the Nossaman law firm, Melious teaches environmental law at Western Washington University’s Huxley College of the Environment.

“As the Department of Ecology has acknowledged, ‘most water in the Nooksack watershed is already legally spoken for,’” she explains. “In 1985, Ecology recognized water scarcity during the dry season by adopting an instream flow rule for the Nooksack watershed, which covers most of the county. According to Ecology, an instream flow is ‘a water right for the stream and the resources that depend on it. It has a priority date like any other water right. Instream flows are the stream flow levels that will protect and preserve instream resources and values.’”

Justices agreed to review an appeal of the 2013 opinion of the state Growth Management Hearings Board that found county land-use policy was not sufficiently protective of rural character and did not adequately protect surface and groundwater supply. Specifically, the Hearings Board found the rural element of county’s Comprehensive Plan for growth “fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells.”

The state’s Growth Management Act is frequently adversarial in nature. Under the law, a county is presumed correct in its land and water use decisions, unless such decisions

can be demonstrated as clearly erroneous. Citizens petition the Growth Management Hearings Board. The board's findings and orders are then subject to appeals to state courts.

The citizens in this case are four Whatcom County residents who, in partnership with the statewide smart growth organization Futurewise, believe that the court's interpretation of state water law is simply wrong. They include smart planning advocate Eric Hirst and former Whatcom County Planning Director David Stalheim, along with other citizens passionate about habitat and the environment. Lining up on the other side is the Building Industry Association, the Realtors, the Farm Bureau and the less organized assortment of residential well owners and water associations across the county. Somewhat in the middle, and potentially assisted by the clarity the decision could yield, is the state Dept. of Ecology.

Seeking the guidance of the courts, the county hired attorneys and appealed the GMHB finding to the state Court of Appeals. The decision they received back fell far short of guidance.

The Court of Appeals ruled narrowly, based in large measure on briefs filed by the state Dept. of Ecology. Ecology asserted that, "In finding these provisions inadequate, the Board misread the scope of Ecology's water management rule for the Nooksack River Basin. Under its express language, this Rule does not govern permit-exempt groundwater use. Contrary to the Board's decision, the Nooksack Rule does not mandate that permit-exempt groundwater is no longer available for new uses in rural areas of the county in all instances and that land use applications relying on wells for water supply must always be denied."

Yet, Ecology's recital of the Nooksack Rule is at odds with rules for other rivers and water bodies around the state, including the Skagit River. Ecology concedes that "in order to comply with the GMA, the County's Comprehensive Plan must include measures that ensure that future development in rural areas will not adversely affect water availability."

The Court of Appeals agreed with Whatcom County, and overturned the GHMB findings, treating the Nooksack River as distinct and distinguishable from other river basins.

"According to the Court of Appeals, junior permit-exempt wells have an absolute right to violate the requirement to protect and preserve instream flows unless Ecology says otherwise in its specific basin-by-basin rules," attorney Jean Melious argues. "And although the Growth Management Act says that it requires the county to protect and enhance water resources, the Court found that 'cooperation with Ecology' is all that the GMA really requires.

"We believe that the Appeals Court interpretation of state water law is simply wrong," Melious said.

By the unanimous vote of a five-judge panel, the Supreme Court decided to hear the case.

“That doesn’t mean, of course, that we’ll win,” Melious cautioned. “However, as I said to a friend who asked what our chances are—they’re much better than if the Court hadn’t taken the case!”

In 2013, the state Supreme Court found that Ecology had overstepped its rule-making authority and allowed oversubscription of stream flows in the Skagit basin based on a “balancing test” that attempts to gauge beneficial uses for water. The Swinomish Indian Tribe sued for relief, based on concerns the balancing rule was not sufficiently protective of instream flows and fish habitat.

The Supreme Court agreed.

“Ecology’s use of its balancing test to determine when the overriding considerations exception will justify reservations of water for exempt domestic wells is not consistent with the statutory requirement of an ‘overriding’ consideration,” justices commented. “There is no question that continuing population growth is a certainty and limited water availability is a certainty. Under the balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values. But the Water Resources Act of 1971 explicitly contemplates the value of instream resources for future populations.”

Ecology uses a similar balancing rule for the Nooksack River.

“If Ecology’s rule does not specifically mention permit-exempt wells, does the GMA require a county to protect surface and ground water resources by regulating development proposing to use water from such wells?” attorneys for the Center for Environmental Law & Policy question in their brief filed with the court. “The Court of Appeals’ decision erroneously sanctions the county’s abdication of its GMA duties, and conflicts with *Kittitas*, *Postema*, and *Swinomish* by allowing groundwater withdrawals to impair stream flows,” the brief notes in recitals of the relevant case law governing water resource management in Washington.

“Whatcom County asserted—and the Court of Appeals agreed—that it need not regulate development relying on permit-exempt wells because Ecology had not addressed them when it adopted the Nooksack Rule,” CELP attorneys note. “Ecology agreed with this position.

“In short, Whatcom County and Ecology argue that because the 1985 [Nooksack] instream flow rule does not address permit-exempt wells, the County may disregard the statutory scheme and 30 years of this Court’s precedents on water and exempt wells. That cannot be the case.”

“The immediate effect of this decision is to provide counties with a shortcut around comprehensively planning and regulating, as the GMA requires, to ensure water availability while preventing permit-exempt wells from dewatering fish-bearing streams in rural areas,” attorneys for the Squaxin Island Tribe complained in submittals to the court. “Counties should not be encouraged to keep sanctioning the proliferation of new unregulated permit-exempt wells at the expense of nearby fish-bearing streams with senior instream flow rights. The Appeals Court’s decision ignored the governing statutory framework and instead erroneously relied on Ecology’s often-defective regulations as a means of meeting counties’ GMA obligations.”

“The Court of Appeals distinguished *Swinomish* on the grounds that it involved the Skagit basin rule, which expressly *governs* permit-exempt withdrawals, while the Nooksack Rule at issue in this case expressly *excludes* permit-exempt withdrawals,” Whatcom County prosecutors and attorneys asserted in their counterarguments, requesting the high court uphold the ruling. The use of the one to leverage the other is improper, county attorneys argue.

Concerned for the primacy of county planning, the Washington State Association of Counties also filed a brief with the court.

“Counties should be able to reasonably rely on relevant water resource management regulations, as drafted and interpreted by Ecology, in planning for the protection of surface water and groundwater resources under the GMA and making water availability determinations required for subdivisions and building permits,” attorneys for the Association argued. “Requiring counties to second-guess Ecology’s implementation of its water resource management rules is problematic for a number of reasons.

“Not all instream flow rules are the same,” noted Josh Weiss, deputy prosecuting attorney for the WSAC General Counsel, in his brief. “Local governments are afforded flexibility in determining how best to comply with GMA obligations. Penalizing a local government for aligning its regulatory approach with that of an agency with expertise and rule-making authority, as was done here, is improper and inconsistent with the cooperative approach contemplated under the GMA.”

“It’s an irony of politics,” Melious concluded. “At this most critical of historical junctures, with unprecedented drought and a future that looks worse rather than better, the initial impulse is to protect the status quo. Vested economic interests are circling the wagons on water and are browbeating Ecology. They need all the help that they can get.”